

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Sep 25, 2023**

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

EMILIE A.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

NO: 4:22-CV-5096-RMP

ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND GRANTING  
JUDGMENT IN FAVOR OF THE  
COMMISSIONER

BEFORE THE COURT, without oral argument, are briefs from Plaintiff Emilie A.<sup>1</sup>, ECF No. 10, and Defendant the Commissioner of Social Security (the "Commissioner"), ECF No. 11. Plaintiff seeks judicial review, pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), of the Commissioner's denial of her claim for Supplemental Security Income ("SSI") under Title XVI of the Social Security Act (the "Act"). *See* ECF No. 10 at 2.

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<sup>1</sup> In the interest of protecting Plaintiff's privacy, the Court uses Plaintiff's first name and last initial.

1 Having considered the parties' briefs, the administrative record, and the  
 2 applicable law, the Court is fully informed.<sup>2</sup> For the reasons set forth below, the  
 3 Court denies judgment for Plaintiff and directs entry of judgment in favor of the  
 4 Commissioner.

## 5 **BACKGROUND**

### 6 ***General Context***

7 Plaintiff applied for SSI on May 23, 2019, alleging an amended onset date of  
 8 September 1, 2018. *See* Administrative Record ("AR")<sup>3</sup> 15, 38, 148–64. Plaintiff  
 9 was 22 years old on the alleged disability onset date and asserted that she is unable  
 10 to work due to seizures and headaches. AR 148, 178–80. Plaintiff's application was  
 11 denied initially and upon reconsideration, and Plaintiff requested a hearing. *See* AR  
 12 72–93.

13 On May 12, 2021, Plaintiff appeared by telephone, represented by her attorney  
 14 Chad Hatfield, at a hearing held by Administrative Law Judge ("ALJ") Mark Kim  
 15 from Spokane, Washington. AR 33–35. The ALJ heard from Plaintiff as well as  
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17 <sup>2</sup> The Court notes that Plaintiff did not file any reply. Failure to comply with the  
 18 filing deadlines set by Local Civil Rule 7 "may be deemed consent to the entry of  
 19 an order adverse to the party who violates these rules." LCivR7(e); *see also* Fed.  
 20 R. Civ. P. 56(e) ("If the adverse party does not respond, summary judgment, if  
 21 appropriate, shall be entered against the adverse party.").

<sup>3</sup> The Administrative Record is filed at ECF No. 8.

1 vocational expert (“VE”) Jillian Fox. AR 35–11. ALJ Kim issued an unfavorable  
2 decision on August 5, 2021, and the Appeals Council denied review. AR 1–6, 16–  
3 22.

4 ***ALJ’s Decision***

5 Applying the five-step evaluation process, ALJ Kim found:

6 **Step one:** Plaintiff has not engaged in substantial gainful activity since the  
7 application date, May 23, 2019. AR 17 (citing 20 C.F.R. § 416.971 *et seq*).

8 **Step two:** Plaintiff has the following severe impairment that is medically  
9 determinable and significantly limits her ability to perform basic work activities,  
10 pursuant to 20 C.F.R. §§ 416.920(c): epilepsy. AR 17. The ALJ further found that  
11 Plaintiff “has reported having memory loss and headaches associated with her  
12 seizure activity[.]” AR 17. However, the ALJ found that these symptoms do not  
13 constitute separate impairments and, moreover, Plaintiff “also testified that her  
14 headaches were brief, and indications of memory loss have not been substantiated  
15 objectively and would posed [sic] no more than minimal limitations on the  
16 claimant’s ability to perform basic work-related mental activities.” AR 17.

17 **Step three:** The ALJ concluded that Plaintiff does not have an impairment or  
18 combination of impairments that met or medically equaled the severity of one of the  
19 listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. AR 17 (citing 20  
20 C.F.R. §§ 416.920(d), 416.925, and 416.926). The ALJ memorialized that he  
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1 reviewed the listings under chapter 11.00 for the neurological system, including  
2 listing 11.02 for convulsive epilepsy. AR 18. The ALJ further recited that “the  
3 claimant has been noted to not be compliant with treatment and her reports of  
4 seizure activity has fluctuated.” AR 18.

5 **Residual Functional Capacity (“RFC”):** The ALJ found that Plaintiff has  
6 the RFC to perform “full range of work at all exertional levels but with the following  
7 non-exertional limitations: except she can never climb ladders, ropes, or scaffolds;  
8 must avoid hazards such as dangerous moving equipment/machinery and  
9 unprotected heights; and she would miss one workday every two months due to her  
10 seizure disorder/physical impairment(s).” AR 18.

11 In determining Plaintiff’s RFC, the ALJ found that Plaintiff’s statements  
12 concerning the intensity, persistence, and limiting effects of her alleged symptoms  
13 “are not entirely consistent with the medical evidence and other evidence in the  
14 record for the reasons explained in this decision.” AR 19.

15 **Step four:** The ALJ found that Plaintiff has no past relevant work. AR 20  
16 (citing 20 C.F.R. § 416.965).

17 **Step five:** The ALJ found that Plaintiff has at least a limited education; was  
18 23 years old, which is defined as a younger individual (age 18-44), on the date that  
19 the application was filed; and that transferability of job skills is not material to the  
20 determination of disability because Plaintiff has no past relevant work. AR 20–21  
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(citing 20 C.F.R. §§ 416.963, 416.964, and 416.968). The ALJ found that given Plaintiff's age, education, work experience, and RFC, Plaintiff can perform jobs that exist in significant numbers in the national economy. AR 21. Specifically, the ALJ recounted that the VE identified the following representative occupations that Plaintiff could perform with the RFC: fast food worker (light, unskilled, with around 2,325,955 jobs nationally); maid (light, unskilled work, with around 896,000 jobs nationally); and storage rental clerk (light, unskilled work with around 43,130 jobs nationally). AR 21. The ALJ concluded that Plaintiff has not been disabled within the meaning of the Act from the application date of May 23, 2019. AR 21.

Plaintiff sought review of the ALJ's decision in this Court. ECF No. 1.

## LEGAL STANDARD

### *Standard of Review*

Congress has provided a limited scope of judicial review of the Commissioner's decision. 42 U.S.C. § 405(g). A court may set aside the Commissioner's denial of benefits only if the ALJ's determination was based on legal error or not supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985) (citing 42 U.S.C. § 405(g)). "The [Commissioner's] determination that a claimant is not disabled will be upheld if the findings of fact are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere

1 scintilla, but less than a preponderance. *Sorenson v. Weinberger*, 514 F.2d 1112,  
2 1119 n.10 (9th Cir. 1975); *McCallister v. Sullivan*, 888 F.2d 599, 601–02 (9th Cir.  
3 1989). Substantial evidence “means such evidence as a reasonable mind might  
4 accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389,  
5 401 (1971) (citations omitted). “[S]uch inferences and conclusions as the  
6 [Commissioner] may reasonably draw from the evidence” also will be upheld. *Mark*  
7 *v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On review, the court considers the  
8 record, not just the evidence supporting the decisions of the Commissioner.  
9 *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989).

10 A decision supported by substantial evidence still will be set aside if the  
11 proper legal standards were not applied in weighing the evidence and making a  
12 decision. *Browner v. Sec’y of Health and Human Servs.*, 839 F.2d 432, 433 (9th Cir.  
13 1988). Thus, if there is substantial evidence to support the administrative findings,  
14 or if there is conflicting evidence that will support a finding of either disability or  
15 nondisability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*,  
16 812 F.2d 1226, 1229–30 (9th Cir. 1987).

### 17 ***Definition of Disability***

18 The Act defines “disability” as the “inability to engage in any substantial  
19 gainful activity by reason of any medically determinable physical or mental  
20 impairment which can be expected to result in death, or which has lasted or can be  
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1 expected to last for a continuous period of not less than 12 months.” 42 U.S.C. §§  
2 423(d)(1)(A). The Act also provides that a claimant shall be determined to be under  
3 a disability only if the impairments are of such severity that the claimant is not only  
4 unable to do their previous work, but cannot, considering the claimant’s age,  
5 education, and work experiences, engage in any other substantial gainful work  
6 which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A). Thus, the  
7 definition of disability consists of both medical and vocational components. *Edlund*  
8 *v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

### 9 ***Sequential Evaluation Process***

10 The Commissioner has established a five-step sequential evaluation process  
11 for determining whether a claimant is disabled. 20 C.F.R. § 416.920. Step one  
12 determines if they are engaged in substantial gainful activities. If the claimant is  
13 engaged in substantial gainful activities, benefits are denied. 20 C.F.R. §  
14 416.920(a)(4)(i).

15 If the claimant is not engaged in substantial gainful activities, the decision  
16 maker proceeds to step two and determines whether the claimant has a medically  
17 severe impairment or combination of impairments. 20 C.F.R. § 416.920(a)(4)(ii). If  
18 the claimant does not have a severe impairment or combination of impairments, the  
19 disability claim is denied.

1 If the impairment is severe, the evaluation proceeds to the third step, which  
2 compares the claimant's impairment with listed impairments acknowledged by the  
3 Commissioner to be so severe as to preclude any gainful activity. 20 C.F.R. §  
4 416.920(a)(4)(iii); *see also* 20 C.F.R. § 404, Subpt. P, App. 1. If the impairment  
5 meets or equals one of the listed impairments, the claimant is conclusively presumed  
6 to be disabled.

7 If the impairment is not one conclusively presumed to be disabling, the  
8 evaluation proceeds to the fourth step, which determines whether the impairment  
9 prevents the claimant from performing work that they have performed in the past. If  
10 the claimant can perform their previous work, the claimant is not disabled. 20  
11 C.F.R. § 416.920(a)(4)(iv). At this step, the claimant's RFC assessment is  
12 considered.

13 If the claimant cannot perform this work, the fifth and final step in the process  
14 determines whether the claimant is able to perform other work in the national  
15 economy considering their residual functional capacity and age, education, and past  
16 work experience. 20 C.F.R. § 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137,  
17 142 (1987).

18 The initial burden of proof rests upon the claimant to establish a *prima facie*  
19 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th  
20 Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden  
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1 is met once the claimant establishes that a physical or mental impairment prevents  
2 them from engaging in their previous occupation. *Meanel*, 172 F.3d at 1113. The  
3 burden then shifts, at step five, to the Commissioner to show that (1) the claimant  
4 can perform other substantial gainful activity, and (2) a “significant number of jobs  
5 exist in the national economy” that the claimant can perform. *Kail v. Heckler*, 722  
6 F.2d 1496, 1498 (9th Cir. 1984).

### 7 ISSUES ON APPEAL

8 The parties’ motions raise the following issues regarding the ALJ’s decision:

- 9 1. Did the ALJ erroneously assess the medical source opinions?
- 10 2. Did the ALJ erroneously omit Plaintiff’s hypothyroidism as a severe  
11 impairment at step two?
- 12 3. Did the ALJ conduct an inadequate analysis at step three?
- 13 4. Did the ALJ erroneously discount Plaintiff’s subjective complaints?
- 14 5. Did the ALJ erroneously reject lay witness testimony?
- 15 6. Did the ALJ fail to meet his step five burden?

### 16 *Medical Source Opinions*

17 Plaintiff argues that the ALJ failed to assess the supportability or consistency  
18 of the disabling opinion from nurse practitioner Kelli Campbell, ARNP. ECF No.  
19 10 at 8–9. Plaintiff continues that the ALJ made “no attempt to address the record  
20 evidence or explanation provided by ARNP Campbell,” which Plaintiff argues falls  
21 short of the requirements of the new regulations addressing medical opinions. *Id.* at

10. Plaintiff asserts that, contrary to the ALJ’s reasoning, ARNP Campbell did not qualify her assessment of Plaintiff, and she “suggested further workup for the claimant’s memory/focus issues and forgetfulness rather than her seizures, noting treatment from neurologist Dr. Erlemeier.” *Id.* Moreover, Plaintiff asserts that the record demonstrates that her past noncompliance occurred before the application date and that missing some appointments due to memory deficits associated with her severe hypothyroidism “is not the same as noncompliance[.]” *Id.* at 10–11. Plaintiff adds that “the fact that the claimant’s reports fluctuated has no bearing on the persuasiveness of ARNP Campbell’s opinion, as seizures are irregular and unpredictable.” *Id.* at 11. Furthermore, Plaintiff cites to portions of the record that she asserts support ARNP Campbell’s assessment. *Id.* (citing AR 311–13, 336–37, 372, 382, 424–25, 434, and 443–44). Plaintiff also cites records indicating that ARNP Campbell began treating Plaintiff before the April 2021 office visit cited by the ALJ. *Id.* at 12 (citing AR 410–11). ARNP Campbell also wrote that Plaintiff “needs to have further evaluation [and] neuropsychologist to investigate memory/focus issues.” *Id.* at 9 (quoting AR 456).

The Commissioner argues that the ALJ reasonably found ARNP Campbell’s opinion on the limiting effects of Plaintiff’s seizures unpersuasive. ECF No. 11 at 8–10. The Commissioner writes, “[ARNP] Campbell wrote her opinion in May 2021, but admitted that she did not start seeing Plaintiff until April 2021.” *Id.* at 9

1 (citing AR 454). The Commissioner also cites to ARNP Campbell's  
2 acknowledgement that "Plaintiff 'needs to have further evaluation [and]  
3 neuropsychologist to investigate memory/focus issues.'" *Id.* (citing AR 456). The  
4 Commissioner submits, "On this record, the ALJ reasonably concluded that because  
5 ARNP Campbell had such a brief treatment history to draw on and candidly  
6 admitted that further evaluation was necessary, her opinion was less persuasive than  
7 if she had a more longitudinal picture of Plaintiff's functioning." *Id.* The  
8 Commissioner further argues that the ALJ's finding that Plaintiff's reports about the  
9 frequency of her seizures fluctuating also supports finding ARNP Campbell's  
10 opinion unpersuasive, as it was based on the premise that Plaintiff was experiencing  
11 seizures at least three times per month. *Id.* (citing 20 C.F.R. § 416.920c(c)(2); AR  
12 341, 347, 353, 374, 389, 394, 399, 413, 455).

13 The regulations that took effect on March 27, 2017, provide a new framework  
14 for the ALJ's consideration of medical opinion evidence, and require the ALJ to  
15 articulate how persuasive he finds all medical opinions in the record, without any  
16 hierarchy of weight afforded to different medical sources. *See Rules Regarding the*  
17 *Evaluation of Medical Evidence*, 82 Fed. Reg. 5844-01, 2017 WL 168819 (Jan. 18,  
18 2017). Instead, for each source of a medical opinion, the ALJ must consider several  
19 factors, including supportability, consistency, the source's relationship with the  
20 claimant, any specialization of the source, and other factors such as the source's  
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1 familiarity with other evidence in the claim or an understanding of Social Security's  
2 disability program. 20 C.F.R. § 404.1520c(c)(1)-(5).

3 Supportability and consistency are the "most important" factors, and the ALJ  
4 must articulate how he considered those factors in determining the persuasiveness of  
5 each medical opinion or prior administrative medical finding. 20 C.F.R. §  
6 404.1520c(b)(2). With respect to these two factors, the regulations provide that an  
7 opinion is more persuasive in relation to how "relevant the objective medical  
8 evidence and supporting explanations presented" and how "consistent" with  
9 evidence from other sources the medical opinion is. 20 C.F.R. § 404.1520c(c)(1).  
10 The ALJ may explain how he considered the other factors, but is not required to do  
11 so, except in cases where two or more opinions are equally well-supported and  
12 consistent with the record. 20 C.F.R. § 404.1520c(b)(2), (3). Courts also must  
13 continue to consider whether the ALJ's finding is supported by substantial evidence.  
14 *See* 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to  
15 any fact, if supported by substantial evidence, shall be conclusive . . .").

16 Prior to revision of the regulations, the Ninth Circuit required an ALJ to  
17 provide clear and convincing reasons to reject an uncontradicted treating or  
18 examining physician's opinion and provide specific and legitimate reasons where the  
19 record contains a contradictory opinion. *See Revels v. Berryhill*, 874 F.3d 648, 654  
20 (9th Cir. 2017). However, the Ninth Circuit has held that the Social Security  
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1 regulations revised in March 2017 are “clearly irreconcilable with [past Ninth  
2 Circuit] caselaw according to special deference to the opinions of treating and  
3 examining physicians on account of their relationship with the claimant.” *Woods v.*  
4 *Kijakazi*, No. 21-35458, 2022 U.S. App. LEXIS 10977, at \*14 (9th Cir. Apr. 22,  
5 2022). The Ninth Circuit continued that the “requirement that ALJs provide  
6 ‘specific and legitimate reasons’ for rejecting a treating or examining doctor’s  
7 opinion, which stems from the special weight given to such opinions, is likewise  
8 incompatible with the revised regulations.” *Id.* at \*15 (internal citation omitted).

9 Accordingly, as Plaintiff’s claim was filed after the new regulations took  
10 effect, the Court refers to the standard and considerations set forth by the revised  
11 rules for evaluating medical evidence. *See* AR 15, 38, 148–64.

12 ARNP Campbell completed a form “Medical Report” for Plaintiff on May 14,  
13 2021. AR 454–57. On the form, ARNP Campbell indicated that Plaintiff’s first and  
14 last dates of treatment with her were on: “4/14/21 (last office visit) 10/6/21[.]” AR  
15 454. ARNP Campbell opined that Plaintiff would miss an average of four or more  
16 days per month if she were attempting to work a full-time schedule, explaining that  
17 Plaintiff “currently reports seizures occurring 3x times month [sic], has to lay down  
18 3 to 4 times a week to rest[.]” AR 455. ARNP Campbell further opined that  
19 Plaintiff is “severely limited” in terms of the exertional level that she can perform,  
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1 meaning that she is “[u]nable to perform the demands of even sedentary work.” AR  
2 455.

3 ARNP Campbell opined that Plaintiff’s limitations specified in this report  
4 have existed since at least December 20, 2012. AR 456. By way of “[o]ther  
5 comments,” ARNP Campbell wrote that Plaintiff “[a]lso needs to have further  
6 evaluation & neuropsychologist to investigate memory/focus issues” and that  
7 Plaintiff “has barriers to care—doesn’t drive, is forgetful so needs support to get to  
8 apts/follow through on recommended plans[.]” AR 456 (as written in original).

9 ALJ Kim found that ARNP Campbell’s assessment “cannot be found  
10 particularly persuasive since [ARNP] Campbell indicated that she had only seen the  
11 claimant for the first time the month before (April 2021) and further evaluation was  
12 needed.” AR 20. ALJ Kim added that “as noted above, the claimant has not always  
13 been medically compliant, and her reports of seizure activity has [sic] fluctuated.”  
14 AR 20.

15 As ALJ Kim noted, ARNP Campbell indicated only two treatment dates for  
16 Plaintiff, in April and October 2021, meaning an appointment merely one month  
17 before the May 2021 form opinion, and an appointment that had not yet occurred.  
18 AR 454–56. Despite the brief length of the treatment relationship that ARNP  
19 Campbell reported, and despite indicating that the limitations were based on  
20 Plaintiff’s “current” reports of seizures occurring three times per month, ARNP  
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1 Campbell opined that Plaintiff's severe limitations had existed since December 20,  
2 2012. AR 454–56. As the ALJ reasoned, Plaintiff did not consistently report that  
3 frequency of seizures throughout the relevant period and sometimes did not report  
4 any seizures. *See* AR 303–19 (treatment records from January through April 2020).  
5 ARNP Campbell also opined that Plaintiff has a barrier to care in part due to being  
6 forgetful, but simultaneously recognized that further evaluation and examination by  
7 a neuropsychologist was necessary to assess Plaintiff's alleged memory and focus  
8 issues. AR 456. As demonstrated by ALJ Kim's discussion and reference to  
9 Plaintiff's medical record, the ALJ provided reasons going to the issues of  
10 consistency and supportability, as well as length of the treatment relationship, that  
11 were supported by substantial evidence. *See* 20 C.F.R. § 416.920c(c) (relevant  
12 factors include: (1) supportability; (2) constancy; and (3) relationship with the  
13 claimant, including the length of treatment relationship and the frequency of  
14 examinations).

15 The Court finds no error in the treatment of medical source opinions and  
16 denies summary judgment to Plaintiff on this ground.

17 ***Step Two***

18 Plaintiff claims that she “suffers the severe impairment of hypothyroidism,  
19 with associated memory loss and cognitive deficits.” ECF No. 10 at 14. Plaintiff  
20 argues that the ALJ erroneously rejected hypothyroidism as a severe impairment at  
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1 step two without explanation. *Id.* (citing AR 17). Plaintiff further argues that the  
2 alleged error of not recognizing hypothyroidism as a severe impairment “led to  
3 another harmful error of the ALJ mistaking a memory impairment for  
4 noncompliance.” *Id.* Plaintiff maintains these errors are harmful because “[w]hen  
5 properly considered, [Plaintiff is determined disabled in accordance with the  
6 findings of ARNP Campbell and Dr. Erlemeier, warranting immediate payment of  
7 benefits.” *Id.*

8       The Commissioner responds that the ALJ reasonably “found that Plaintiff’s  
9 alleged memory loss was not ‘substantiated objectively.’” ECF No. 11 at 2 (citing  
10 AR 17). The Commissioner cites the Court to examinations findings that Plaintiff  
11 had intact memory and denied memory loss. *Id.* at 2–3 (citing AR 317, 337, 434–  
12 35). The Commissioner asserts that Plaintiff does not cite any objective evidence of  
13 memory problems. *Id.* at 3. Moreover, the Commissioner maintains that because  
14 the ALJ resolved step two in Plaintiff’s favor by finding epilepsy to be a severe  
15 impairment, and expressly considered Plaintiff’s alleged memory problems in  
16 assessing Plaintiff’s RFC, there was no harmful error at step two. *Id.*

17       At step two, an ALJ must determine if the claimant has a “severe” medically-  
18 determinable impairment or combination of severe medically-determinable  
19 impairments. 20 C.F.R. § 416.924(a). A claimant bears the burden of showing a  
20 medically “severe impairment” or “combination of impairments.” *Barnhart v.*  
21



1 *Thomas*, 540 U.S. 20, 24 (2003). However, the claimant’s burden is not heavy, as  
2 step two is a “de minimis screening device to dispose of groundless claims.” *Smolen*  
3 *v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996); *see also Webb v. Barnhart*, 433 F.3d  
4 683, 687 (9th Cir. 2005). Provided that the claimant produces some evidence of an  
5 impairment, the Commissioner may conclude that the impairment is non-severe only  
6 where the medical evidence “establishes only a slight abnormality or combination of  
7 slight abnormalities which would have no more than a minimal effect on an  
8 individual’s ability to work.” SSR 85-28, 1985 SSR LEXIS 19, at \*7-8, 1985 WL  
9 56856, at \*3 (1985).

10 If a claimant satisfies step two’s de minimis standard, an ALJ “must find that  
11 the impairment is ‘severe’ and move to the next step” in the five-step evaluation.  
12 *Edlund v. Massanari*, 253 F.3d 1152, 1160 (9th Cir. 2001) (emphasis in original).  
13 An ALJ’s error at step two is not reversible if the ALJ resolves step two in claimant’s  
14 favor and otherwise properly accounts for Plaintiff’s limitations. *See Buck v.*  
15 *Berryhill*, 869 F.3d 1040, 1048–49 (9th Cir. 2017).

16 In this case, the ALJ resolved step two in Plaintiff’s favor by finding  
17 Plaintiff’s epilepsy to be a severe impairment. *See Hoopai v. Astrue*, 499 F.3d 1071,  
18 1076 (9th Cir. 2007) (the step-two finding is “merely a threshold determination” that  
19 “only raises a prima facie case of a disability”). The ALJ proceeded to discuss the  
20 symptoms that Plaintiff alleges to result from hypothyroidism, memory loss and  
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1 headaches, in assessing Plaintiff's subjective symptom complaints. *See* AR 17.  
2 Therefore, even if the Court were to find error in the ALJ's treatment of  
3 hypothyroidism at step two, which it does not, that error would be harmless. *See*  
4 *Burch*, 400 F.3d at 682 (concluding that any error ALJ committed at step two was  
5 harmless where the step was resolved in claimant's favor); *Kemp v. Berryhill*, 2017  
6 U.S. Dist. LEXIS 147729, 2017 WL 3981195, at \*5 (C.D. Cal. Sept. 8, 2017) (any  
7 error in declining to find other alleged impairments severe is harmless because step-  
8 two is the "gatekeeping" step, and the ALJ continued the analysis). The Court  
9 denies summary judgment to Plaintiff on this ground and resolves the same in favor  
10 of the Commissioner.

### 11 ***Step Three***

12 Plaintiff argues that the ALJ summarily concluded that Plaintiff does not meet  
13 or equal a listing, specifically listing 11.02(A), without sufficient analysis. ECF No.  
14 10 at 14 (citing AR 17–18).

15 The Commissioner responds that the ALJ reasonably concluded that  
16 Plaintiff's impairments do not satisfy the requirements of any listing. ECF No. 11 at  
17 4. The Commissioner argues that listing 11.02(A) for epilepsy requires generalized  
18 tonic-clonic seizures occurring at least once a month for at least three consecutive  
19 months despite adherence to prescribed treatment, but, as the ALJ found, Plaintiff  
20 was discharged from treatment with one of her doctors because of too many missed  
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1 appointments. *Id.* at 4–5 (citing 20 C.F.R. Part 404, Subpart P, App. 1, § 11.02A;  
2 AR 18, 307). The Commissioner continues that even if Plaintiff’s memory problems  
3 caused her to miss appointments, which the Commissioner disputes, medical records  
4 indicating that Plaintiff’s seizure activity fluctuated undermine that her seizures  
5 occurred monthly for three consecutive months, as required for the listing. *Id.* at 5.

6 Plaintiff bears the burden of proof at step three. *Bowen*, 482 U.S. at 146 n. 5.  
7 A mere diagnosis does not suffice to establish disability, and the per se disability  
8 under a listing requires “a higher level of severity than the statutory standard” for  
9 disability under the SSA. *Sullivan v. Zebley*, 493 U.S. 521, 532 (1990); *see also Key*  
10 *v. Heckler*, 754 F.2d 1545, 1549–50 (9th Cir. 1985). A claimant must show that her  
11 impairment meets all of a listing’s specified medical criteria. *Sullivan*, 493 U.S. 521  
12 at 530.

13 The challenged listing requires a claimant to prove that she suffers from  
14 epilepsy by providing “a detailed description of a typical seizure” and documenting  
15 that the seizures qualify as “[g]eneralized tonic-clonic seizures (*see* 11.00H1a),  
16 occurring at least once a month for at least 3 consecutive months (*see* 11.00H4)  
17 despite adherence to prescribed treatment (*see* 11.00C)[.]” 20 C.F.R. Part 404,  
18 Subpart P, App. 1, § 11.02A. The ALJ found that “the claimant has been noted to  
19 not be compliant with treatment and her reports of seizure activity has [sic]  
20 fluctuated.” AR 18.

1 Plaintiff contends that the ALJ “fails to identify even one treatment record  
2 since the application date showing that [Plaintiff] was noncompliant with treatment.”  
3 ECF No. 10 at 15. However, as the ALJ cites in his decision, a provider noted  
4 Plaintiff’s noncompliance with recommended treatment in October 2018, after  
5 Plaintiff’s alleged onset date. AR 448–49 (“Seizure is uncontrolled since she was  
6 last seen in 12/2017. Patient is noncompliant.”). In April 2019, treatment notes from  
7 a neurology appointment found Plaintiff’s noncompliance was “improved,” but also  
8 memorialized that the provider had “[d]iscussed with the patient the importance of  
9 compliance” and had instructed Plaintiff to call in the event of another breakthrough  
10 seizure and “follow up in 2 months or earlier as needed.” AR 425. An August 2019  
11 medical record notes noncompliance. AR 426. In January 2020, a primary care  
12 provider noted that Plaintiff had been discharged from care by her former  
13 neurologist for missing too many appointments, with her last appointment in April  
14 2019. AR 316; *see also* AR 334 (specifying that Plaintiff missed “3 or more  
15 appointments”). Plaintiff claims that she missed appointments due to her memory  
16 issues associated with hypothyroidism, but Plaintiff does not substantiate this  
17 allegation with any records showing that her hypothyroidism existed on the dates of  
18 her missed appointments. *See* ECF No. 10 at 17–18. In April 2019, at what appears  
19 to be the last neurology appointment that Plaintiff attended before being discharged  
20 from her former neurologist’s care for missing three or more appointments,

1 Plaintiff's thyroid stimulating hormone ("TSH") levels were normal. AR 424–25.  
2 The record also reflects that Plaintiff was able to attend other appointments during  
3 the approximate period of her missed appointments. *See* AR 369. There is no  
4 diagnosis of hypothyroidism until an appointment on April 9, 2020. AR 310–13; *see*  
5 *also* AR 334 (October 2020 appointment record indicating that Plaintiff's blood test  
6 on February 25, 2020 show highly elevated TSH levels). There is no evidence  
7 directly establishing that Plaintiff had hypothyroidism resulting in memory issues at  
8 the same time that she missed neurology appointments. Therefore, this is a matter of  
9 interpretation of the record that is within the ALJ's role, not this Court's. *See Ryan*  
10 *v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008) (providing that the  
11 Court shall consider the ALJ's decision in the context of "the entire record," and if  
12 the "evidence is susceptible to more than one rational interpretation, the ALJ's  
13 decision should be upheld.").

14 The record also contains substantial support for the ALJ's finding that  
15 Plaintiff reported varying frequencies of her seizures, and sometimes reported that  
16 she was not having any seizures. *See* AR 367. As Plaintiff does not indicate any  
17 records supporting that she had at least one seizure each month for a period of three  
18 months, and the ALJ had substantial evidence of noncompliance to support his  
19 reasoning, the Court finds no error on this ground.

20 ///

1           ***Subjective Symptom Testimony***

2           Plaintiff argues that the ALJ failed to provide specific, clear, and convincing  
3 reasons for discounting Plaintiff's testimony and instead merely summarized the  
4 medical evidence. ECF No. 10 at 17. Plaintiff disputes whether the record supports  
5 the ALJ's reasoning that Plaintiff had been noncompliant with treatment and asserts  
6 that "there are no indications she was noncompliant with treatment in April 2019,  
7 August 2019, or June 2020." *Id.* Plaintiff also argues that her memory and other  
8 cognitive deficits stemming from hypothyroidism "have resulted in missing  
9 appointments," and Plaintiff did not discover her hypothyroidism until April 2020.  
10 *Id.* at 18.

11           The Commissioner responds that the ALJ could rely on Plaintiff's  
12 unexplained, or inadequately explained, failure to seek treatment or follow a  
13 prescribed course of treatment to discount her subjective complaints. ECF No. 11 at  
14 7 (citing *Fair v. Bowen*, 885 F.2d 597, 603–04 (9th Cir. 1989)). The Commissioner  
15 further argues that Plaintiff's fluctuating reports about the frequency of her seizure  
16 activity are an additional legitimate reason to discount her allegations. *Id.* (citing  
17 *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001)).

18           Plaintiff stated at the hearing that she had been getting approximately two to  
19 three seizures per month for the couple of years prior to the hearing. AR 39. In  
20 finding Plaintiff's statements concerning the intensity, persistence, and limiting  
21

1 effects of her seizures to be “not entirely consistent” with the medical and other  
2 evidence of record, the ALJ reasoned that Plaintiff “has not always been medically  
3 compliant [with her medication] and her reports of seizure activity has fluctuated,  
4 and has not been at the frequency alleged for disability purposes.” AR 19.

5 In deciding whether to accept a claimant’s subjective pain or symptom  
6 testimony, an ALJ must perform a two-step analysis. *Smolen v. Chater*, 80 F.3d  
7 1273, 1281 (9th Cir. 1996). First, the ALJ must evaluate “whether the claimant has  
8 presented objective medical evidence of an underlying impairment ‘which could  
9 reasonably be expected to produce the pain or other symptoms alleged.’”  
10 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007) (quoting *Bunnell v.*  
11 *Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991)). Second, if the first test is met and there  
12 is no evidence of malingering, “the ALJ can reject the claimant's testimony about the  
13 severity of [his] symptoms only by offering specific, clear and convincing reasons  
14 for doing so.” *Smolen*, 80 F.3d at 1281.

15 As discussed above, Plaintiff does not substantiate her allegation that she had  
16 memory problems due to hypothyroidism while she was missing neurology  
17 appointments and does not explain why she was able to attend other appointments  
18 during the same approximate period that she was missing neurology appointments.  
19 Rather, the record contains substantial support for the ALJ’s reasoning that Plaintiff  
20 was noncompliant with treatment during the relevant period. *See* AR 425–26, 448–  
21

49. Furthermore, the record also contains substantial support for the ALJ’s finding that Plaintiff reported varying frequencies of her seizures, and sometimes reported that she was not having any seizures. *See* AR 367. These reasons are specific, clear, and convincing and are supported by substantial evidence. The Court finds no error on this ground.

***Lay Witness Testimony***

Plaintiff asserts that the ALJ impermissibly discounted lay witness statements from Plaintiff’s “mother, father, ex-husband/partner, and former mother-in law detailing her progressive convulsive seizures, speech deficits, cognitive impairment, forgetfulness, tics, injuries from falls, and extended recovery time where she is weak and incoherent, resulting in the inability to maintain competitive employment.” ECF No. 10 at 16 (citing AR 238–45). Plaintiff argues that the ALJ mischaracterized the record and failed “to recognize the fact that [Plaintiff] has been compliant since the application date, and misunderstands the nature of epilepsy.” *Id.* Plaintiff adds that, “[i]n sum, none of the ALJ’s reasons are germane to the claimant’s family members who have witnessed first-hand her seizures and progressive decline in functioning.” *Id.*

The Commissioner responds that under the relevant regulations, the ALJ “was not required to provide any analysis of how he considered the nonmedical source statements, let alone provide germane reasons to reject them.” ECF No. 11 at 12



1 (citing 20 C.F.R. § 416.920c(b); Revisions to Rules Regarding the Evaluation of  
2 Medical Evidence, 82 Fed. Reg. 5,844, 5,850 (Jan. 18, 2017)). Moreover, the  
3 Commissioner argues that the reasoning that the ALJ provided, despite not being  
4 required to provide reasons to reject the testimony, was legally sufficient. *Id.* (citing  
5 *Valentine v. Comm’r Soc. Sec. Admin.*, 574 F.3d 685, 694 (9th Cir. 2009)).

6 The ALJ in this case asserted that he was not required to articulate how he  
7 considered evidence from nonmedical sources, but nevertheless reasoned as follows  
8 with respect to the statements in the record from Plaintiff’s mother, father, ex-  
9 husband/partner, and former mother-in-law: “In short, while these third-party report  
10 statements confirm that the claimant has a seizure disorder/epilepsy and as noted  
11 above, the claimant has not always been medically compliant, and her reports of  
12 seizure activity has fluctuated.” AR 20.

13 The revised regulations that apply to disability applications filed on or after  
14 March 27, 2017, provide that lay witness testimony fits within the category of  
15 evidence from nonmedical sources, which the ALJ will “consider” in how a  
16 claimant’s symptoms affect his activities of daily living and his ability to work. *See*  
17 20 C.F.R. §§ 416.913(a)(4), 416.945(a)(3), and 416.929(a). However, an ALJ is  
18 “not required to articulate *how* [he or she] considered evidence from nonmedical  
19 sources.” 20 C.F.R. § 416.920c(d) (emphasis added).

1 Prior to the revisions to the relevant regulations, the United States Court of  
2 Appeals for the Ninth Circuit required an ALJ to express germane reasons for  
3 discounting lay witness testimony. *Turner v. Comm'r*, 613 F.3d 1217, 1224 (9th  
4 Cir. 2010). As other courts have noted, the Ninth Circuit has yet to address whether  
5 the revised regulations modify the requirement for germane reasons to discount lay  
6 witness testimony. *See Johnson v. Kijakazi*, 2022 U.S. App. LEXIS 24769, at \*4–5  
7 (9th Cir. Sept. 1, 2022) (declining to address whether an ALJ must discuss the  
8 treatment of lay witness statements in his or her decision after the 2017 revised  
9 regulations); *Sharon v. Kijakazi*, 2023 U.S. Dist. LEXIS 10129 (D. Id. Jan. 18,  
10 2023); *Robert U. v. Kijakazi*, 2022 U.S. Dist. LEXIS 20038, 2022 WL 326166, at \*7  
11 (D. Or. Feb. 3, 2022). The Court notes, however, that the Ninth Circuit has  
12 expressed in dicta in an unpublished decision that while “it is an open question  
13 whether ALJs are still required to consider lay witness evidence under the revised  
14 regulations, . . . it is clear that they are no longer required to articulate it in their  
15 decisions.” *Fryer v. Kijakazi*, No. 21-36004, 2022 U.S. App. LEXIS 35651, at \*7  
16 n.1 (9th Cir. Dec. 27, 2022).

17 Furthermore, the Ninth Circuit has continued to hold after the 2017 revision of  
18 the regulations that any error by an ALJ in failing to provide reasons for rejecting a  
19 lay witness is harmless if the ALJ’s reasons for discounting the plaintiff’s testimony  
20 were sufficient and the lay testimony is substantially similar to the plaintiff’s  
21

1 testimony. *See Valentine v. Comm’r*, 574 F.3d 685, 694 (9th Cir. 2009) (holding  
2 that the same germane reasons that applied to the claimant’s testimony applied to his  
3 wife’s, which was similar to his own); *Johnson*, 2022 U.S. App. LEXIS 24769, at \*5  
4 (finding the ALJ’s failure to address lay witness testimony harmless where the lay  
5 witness statements were “largely duplicative” of plaintiff’s testimony).

6 The third-party statements in this case replicate Plaintiff’s subjective  
7 complaints about the disabling effect of her seizures. *See* AR 238–45. Therefore, in  
8 discounting the third-party statements for the same reasons that he discounted  
9 Plaintiff’s subjective testimony, the ALJ provided a germane reason and did not err.

10 The Court finds no error on this ground. Therefore, the Court denies  
11 judgment to Plaintiff, and grants judgment to the Commissioner with respect to the  
12 ALJ’s treatment of lay witness statements.

### 13 ***Step Five***

14 Plaintiff contends that the ALJ erred at step five because the VE testified in  
15 response to a hypothetical that Plaintiff argues was incomplete because it  
16 “underrepresents both the frequency of her seizures and the duration of her recovery  
17 period.” ECF No. 10 at 20. The ALJ’s hypothetical must be based on medical  
18 assumptions supported by substantial evidence in the record that reflect all of a  
19 claimant’s limitations. *Osenbrock v. Apfel*, 240 F.3d 1157, 1165 (9th Cir. 2001).  
20 The ALJ is not bound to accept as true the restrictions presented in a hypothetical  
21

1 question propounded by a claimant's counsel. *Osenbrock*, 240 F.3d at 1164. The  
2 ALJ may accept or reject these restrictions if they are supported by substantial  
3 evidence, even when there is conflicting medical evidence. *Magallanes v. Bowen*,  
4 881 F.2d 747, 756 (9th Cir. 1989).

5 Plaintiff's argument assumes that the ALJ erred in his treatment of Plaintiff's  
6 subjective symptom testimony and the medical source testimony and in formulating  
7 the RFC. As discussed above, the ALJ's assessment of this evidence was not  
8 erroneous. Therefore, the RFC and hypothetical contained the limitations that the  
9 ALJ found credible and supported by substantial evidence in the record. The ALJ's  
10 reliance on testimony that the VE gave in response to the hypothetical was proper.  
11 *See Bayliss v. Barnhart*, 427 F.3d 1211, 1217–18 (9th Cir. 2005). The Court grants  
12 judgment to the Commissioner on this final ground.

### 13 CONCLUSION

14 Having reviewed the record and the ALJ's findings, this Court concludes that  
15 the ALJ's decision is supported by substantial evidence and free of harmful legal  
16 error. Accordingly, **IT IS HEREBY ORDERED** that:

- 17 1. Plaintiff's Opening Brief, **ECF No. 10**, is **DENIED**.
- 18 2. Defendant the Commissioner's Brief, **ECF No. 11**, is **GRANTED**.
- 19 4. Judgment shall be entered for Defendant.

**IT IS SO ORDERED.** The District Court Clerk is directed to enter this Order, enter judgment as directed, provide copies to counsel, and **close the file** in this case.

**DATED** September 25, 2023.

*s/ Rosanna Malouf Peterson*  
 ROSANNA MALOUF PETERSON  
 Senior United States District Judge